

**March 10, 2006**

**DECISION AND ORDER**

**OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Marilyn R. Sutton

Date of Filing: January 30, 2006

Case Number: TFA-0147

On January 30, 2006, Marilyn R. Sutton filed an appeal from a determination issued to her on January 5, 2006 by the Department of Energy's (DOE) Office of Legacy Management (LM). In that determination, LM responded to a request for documents that Ms. Sutton submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LM stated that, since it had no way of identifying the requested documents, it was unable to locate the documents and provide Ms. Sutton with the requested information. This appeal, if granted, would require LM to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

**I. Background**

On August 12, 2005, Ms. Sutton filed a request for eleven enclosures contained in a letter from Mr. James J. Fiore, Deputy Assistant Secretary of Energy, to Mr. William R. Augustine, Deputy Chief Programs Management Division, U.S. Army Corps of Engineers, dated October 19, 1999. The letter did not identify the enclosures by name. Letter from Marilyn R. Sutton to James J. Fiore, Deputy Assistant Secretary of Energy (August 12, 2005). LM issued a determination which directed Ms. Sutton to the "Considered Sites Database," an electronic database maintained by LM. Letter from Tony R. Carter, LM, to Marilyn R. Sutton (October 6, 2005) (First Determination Letter). LM determined that any information relevant to Ms. Sutton's request was contained in the database. LM did not provide Ms. Sutton with any documents; rather, the determination included instructions for accessing and searching the database. *Id.* Ms. Sutton appealed that determination stating that, although the letter she referenced in her request was available in the database, the documents she requested were not available. In processing that appeal, we learned that since the letter did not identify the titles of the requested enclosures, a search of LM's paper files was necessary to attempt to identify and locate the documents.

Accordingly, we remanded the matter to LM and directed that LM perform a search of its paper files. *See Marilyn R. Sutton*, Case No. TFA-0132 (December 9, 2005).

On January 5, 2006, LM issued a determination stating that a search of its paper files yielded no new information. Consequently, LM was again unable to identify the requested documents. LM restated that any information possibly relevant to Ms. Sutton's request was contained in the "Considered Sites Database." Letter from Tony R. Carter, LM, to Marilyn R. Sutton (January 5, 2006) (Second Determination Letter).

In the instant appeal, Ms. Sutton challenges LM's second determination letter. Ms. Sutton maintains that it is LM's responsibility to identify and provide her with the responsive records. Letter from Marilyn R. Sutton to OHA (January 21, 2006).

## II. Analysis

It is well established that, in responding to a request for information filed under the FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8<sup>th</sup> Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted LM to discuss the search for the requested records. LM informed us that it conducted a search of its paper files but was unable to locate the requested records. LM informed us that, because the letter referenced in Ms. Sutton's initial request did not identify the enclosures by name, it was impossible to identify those documents. *See* Memorandum of Telephone Conversation between Sheila Dillard, LM, and Diane DeMoura, OHA (February 6, 2006). According to LM,

[The] search consisted of a manual review of record indexes and electronic queries of metadata in the [LM] records management system. The search consisted of all active and inactive record holdings on site and in the custody of LM in Federal Records Centers. Records personnel also queried the DOE Office of Environmental Management FUSRAP Considered Sites Database. The subject letter was found in the FUSRAP collection, but the attached list of enclosures was not present. Each document in the site collection, which is approximately [one] cubic foot in volume, was also thoroughly reviewed.

*See* Electronic Mail Message from Sheila Dillard to Diane DeMoura (February 27, 2006). Additionally, LM located and contacted Mr. Fiore, the original author of the letter, but his staff was also unsuccessful in locating the requested enclosures. *See* Electronic Mail Message from Sheila Dillard to Diane DeMoura (February 6, 2006).

Based on this information, we find that, despite being unsuccessful in identifying the requested documents, LM's search was extensive and reasonably calculated to reveal records responsive to Ms. Sutton's request and was, therefore, adequate. *See, e.g., National Security Archive*, 29 DOE ¶ 80,105 (2004). Accordingly, this appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 30, 2006 by Marilyn R. Sutton, OHA Case No. TFA-0147, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: March 10, 2006